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No. 00-

IN THE

Supreme Court of the United States

STEVEN GRAVATT and DELORES GRAVATT,

Petitioners,

v.

SIMPSON & BROWN, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When is a harbor worker's dual capacity employer, *i.e.*, a person who is at the same time both the employer of the injured harbor worker and the owner of the vessel on which the harbor worker is injured, liable in tort under section 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950 (1986)?

2. Is an employer who is a vessel owner and also a marine construction contractor (a "dual capacity employer") entitled to the same insulation from liability which hiring an independent marine construction contractor might have afforded?

3. Did the appellate panel abuse its authority when it failed to follow established law of the Court of Appeals for the Second Circuit and reversed the district court's holding that an injured harbor worker, covered under the provisions of the LHWCA, was entitled to recover against his dual capacity employer?

4. Did the appellate panel exceed its authority when it ignored the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure and reversed the district court's finding of fact that the plaintiff harbor worker's "injuries were caused by [the dual capacity employer] in its capacity as vessel owner"?

PARTIES TO THE PROCEEDING

Petitioners:

Steven Gravatt and Delores Gravatt

Respondent:

Simpson & Brown, Inc.

The City of New York and N. Massand, P.E., L.S., P.C., were defendants in the district court proceedings. They did not appeal the district court's judgment to the United States Court of Appeals for the Second Circuit.

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Appendix C — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed October 26, 2000 ..... 141a

Petitioners, Steven Gravatt and Delores Gravatt, respectfully request that a writ of certiorari be granted to review the judgment entered in this case by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at *Gravatt v. The City of New York*, 226 F.3d 108 (2d Cir. 2000) (App. A). The opinion of the United States District Court for the Southern District of New York is reported at *Gravatt v. The City of New York*, 53 F. Supp. 2d 388 (S.D.N.Y. 1999) (App. B).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 18, 2000. The court of appeals denied a timely petition for rehearing on October 26, 2000 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950 (1986), provides in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party. . . .

Rule 52(a) of the Federal Rules of Civil Procedure states in relevant part:

> Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

On January 31, 1996, Steven Gravatt, a thirty-seven year old harbor worker, was seriously and permanently injured while working on a barge in New York's navigable waters.

Shortly after lunch Mr. Gravatt was instructed to go onto a barge to move several old piles that were obstructing access to two drafts of new lumber still on the barge. The old piles that were obstructing access to the drafts of new lumber had been dumped on top of or near the new material by Simpson & Brown, Inc. ("S&B"), a marine construction contractor who owned the barge and its equipment and employed Mr. Gravatt as a dock builder. The stowage of the old piles resembled a giant game of "pick up sticks." (App. B at 82a).

Mr. Gravatt's job duties did not include moving material on barges. It was another employee's job at the site to move this kind of debris. Nevertheless, Mr. Gravatt was instructed to use timber tongs to lift and swing the piles (App. B at 82a). As one of the piles was being hoisted, the end of it became stuck in some of the debris on S&B's barge. The pile fell onto the deck, and bounced up and struck Mr. Gravatt in the back of his legs, crushing his ankles and

knocking him from the top of a draft of lumber some 25 feet into the freezing waters of the Harlem River (App. B at 83a).

Mr. Gravatt and his wife commenced a personal injury action against S&B in its capacity as vessel owner under section 905(b) of the LHWCA. After studying nearly 1000 pages of deposition testimony and hearing oral argument on the parties' cross-motions for summary judgment; overseeing a five-day bench trial with seventeen witnesses, including nine fact witnesses; and, analyzing proposed post-trial findings of fact and conclusions of law, the district court (Judge Robert W. Sweet, one of the court's most distinguished and experienced admiralty jurists), in a detailed eighty-seven page opinion, held that S&B was liable to the Gravatts under each of the opposing liability standards set forth in (a) *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983), and (b) *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996, *en banc*), *cert. denied*, 520 U.S. 1117 (1997). The district court awarded compensatory damages exceeding $1,800,000 and punitive damages of $400,000 against S&B.

The district court made a finding of fact that S&B was acting in its capacity as vessel owner when its reckless and wanton negligence disabled Mr. Gravatt for the rest of his life. The appellate panel agreed that S&B was negligent. In fact, S&B conceded that it was negligent. Still, the appellate panel, in total disregard of the rule against appellate fact-finding, reversed the district court's finding of fact and ruled that S&B was acting it its capacity as employer and was, therefore, immune from tort liability.

The appellate panel also reversed the district court's ruling that S&B was liable under *Fanetti*.

REASONS FOR GRANTING THE WRIT

Introduction

The LHWCA is a federal workers' compensation program for longshore workers, harbor workers and others. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381 (2d Cir. 1993). Its provisions affect hundreds of thousands of longshore and harbor workers in the United States.

Like most state workers' compensation schemes, the LHWCA permits injured workers to sue negligent third parties. 33 U.S.C. § 905(b); *Jones & Laughlin Steel Corp.*, 462 U.S. at 528-532; *Guilles*, 12 F.3d at 381. The LHWCA explicitly permits an injured worker to sue a negligent vessel owner. Such an action is commonly known in the maritime community as a "905(b) action" because it is authorized by section 905(b) of the LHWCA, which provides in part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party. . . .

In *Jones & Laughlin Steel Corp. v. Pfeifer*, *supra*, this Court held that an LHWCA employee, such as a harbor worker, may bring a 905(b) action for negligence against a vessel owner even if the vessel owner is also the injured worker's employer. The opinion, however, has spawned confusion among the circuits as to the standards to be used

in allowing recovery in tort against such a dual capacity vessel owner/employer.

Three judges of the Court of Appeals for the First Circuit, Justice Breyer's former court, on five separate occasions in three separate opinions rendered in *Morehead*, *supra*, implored this Court to provide an answer.

Levin H. Campbell, Senior Circuit Judge, thrice requested this Court's guidance in the *en banc* opinion:

> We vacated both opinions and granted rehearing en banc so as to provide a consistent rule in this circuit pending, at least, further instruction from the Supreme Court or Congress.
>
> * * *
>
> While the Supreme Court has endorsed the bringing of section 905(b) negligence actions against a dual capacity defendant in its vessel owner capacity, the Court has yet to define, in such a case, the point at which employer responsibility ends and vessel responsibility begins. Nor has the Court decided to what extent principles laid down in negligence actions brought by longshore workers against a vessel owned by a third-party apply to claims by non-stevedoring contractor harbor workers brought against a vessel owned by their own employer.
>
> * * *

> We can only hope that the Supreme Court will eventually elucidate the standards applicable to dual status employers of harbor workers in circumstances comparable to these.

Morehead, 97 F.3d at 605-606.

Judge Selya, in a concurring opinion, said:

> I write separately, however, to urge the Supreme Court and Congress to reflect upon the mind games that *Jones & Laughlin* — particularly as applied to harbor workers — compels us to play, and, hopefully, to revisit the question of whether "dual capacity" employers should be liable at all in negligence actions brought by their employees.

Morehead, 97 F.3d at 616.

Judge Cyr, in a dissent, urged:

> Ultimately, therefore, the Congress or the Supreme Court must provide a definitive response to the present conundrum.

Morehead, 97 F.3d at 622.

The appellate panel in the instant matter likewise desired this Court's guidance on the issue presented, and expressed its concern that this Court had not established guidelines to be employed when analyzing the negligence of a dual capacity vessel owner/employer (App. A at 26a).

Thousands of longshore and harbor workers will be affected by the appellate panel's decision.[1] Because of (a) a conflict in the Courts of Appeals for the First and Second Circuits on an important federal issue, (b) the appellate panel's abuse of its authority in failing to follow the law of its own circuit, thus causing uncertainty as to the current state of the law in the Court of Appeals for the Second Circuit on this crucial matter, and (c) the appellate panel's exceeding its authority by ignoring the "clearly erroneous" standard of Fed. R. Civ. P. 52(a), petitioners Steven and Delores Gravatt respectfully request that a writ of certiorari be granted to review the judgment entered by the appellate panel from the Court of Appeals for the Second Circuit.

I. A CONFLICT EXISTS BETWEEN DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

This is an issue of first impression for the Court.[2]

In *Fanetti* the Second Circuit held that "a shipowner choosing to act as its own stevedore is [not] entitled to

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1. The LHWCA applies to approximately 500,000 workers who are injured or contract occupational diseases occurring on the navigable waters of the United States, or in adjoining areas. United States Department of Labor, *Employment Standards Administration Office of Workers' Compensation Programs Division of Longshore and Harbor Workers' Compensation*; Fact Sheet, January 18, 2001; *www.dol.gov*.

2. In the past ten years this Court has decided numerous cases regarding an LHWCA worker's right to benefits under the Act and has decided a few cases regarding an LHWCA claimant's right to bring a Jones Act cause of action. The Court has not, however, decided the issue presented herein.

insulation from liability, partial or total, which hiring an independent contractor might have afforded." *Fanetti*, 678 F.2d at 428. The court held that a negligent shipowner, who does not hire an independent expert stevedore but rather acts as its own stevedore, is not entitled to insulate itself from liability to an injured employee/longshoreman under section 905(b) of the LHWCA. The *Fanetti* court, citing *Napoli v. TransPacific Carriers Corp.*, 536 F.2d 505 at 508 (2d Cir. 1976), stated:

> [A] charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" is clearly inappropriate where the shipowner, itself, is the stevedore.

Fanetti, 678 F.2d at 428.

In other words, a negligent dual capacity employer will be held liable to an injured LHWCA employee under section 905(b) regardless of whether the employer's knowledge of the dangerous condition on the vessel which caused the injury was acquired in its capacity as vessel owner or employer. Knowledge is knowledge.

In *Fanetti*, the court allowed the injured longshoreman to recover against his dual capacity employer, who acted as both shipowner and stevedore, and refused to adopt the concept of a "shipowner's right to rely upon an expert contractor who, in fact, was not there" because such a concept is "schizophrenic." *Fanetti*, 678 F.2d at 430.

In *Morehead*, the First Circuit disagreed with *Fanetti*. It held that in a dual capacity employer situation it is proper

for a court to determine whether the dual capacity employer's negligence occurred in its employer capacity or in its vessel owner capacity. As the concurring opinion indicates, this approach required the court "to engage in a legal fiction, pretending that a single entity (the injured person's employer) is really two distinct and separable entities (employer and vessel owner *pro hac vice*)." *Morehead*, 97 F.3d at 616.

The dissent recognized the "current circuit split on this issue," *id.* at 618, and expressed great concern that the dual capacity fiction "[a]t best . . . devolves into a metaphysical exercise, at worst into an inducement to dual capacity employers to perpetuate hazardous conditions within their exclusive control." *Id.* at 621.

Not only the majority opinion of the *en banc* panel in *Morehead*, but also the concurring and dissenting opinions, beseeched the Supreme Court to give guidance. One judge asked this Court to put an end to "the mind games that *Jones & Laughlin* . . . compels us to play," *id.* at 616; another judge correctly criticized the majority for interpretating dictum in the *Jones* case "as the Supreme Court's endorsement of a legal fiction," *id.* at 617; and, the majority "hope[d] that the Supreme Court will eventually elucidate the standards applicable to dual status employers of harbor workers in circumstances comparable to these." *Id.* at 606. This Court must reconcile the conflict between the circuits and resolve this important issue of dual capacity employer liability to harbor workers under the LHWCA.

II. THE APPELLATE PANEL ABUSED ITS AUTHORITY WHEN IT FAILED TO FOLLOW THE ESTABLISHED LAW OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

In the instant matter, the appellate panel not only further confused an already confused state of affairs between the circuits, but also abused its authority when it failed to follow *Fanetti*, the established law of the Second Circuit.

The district court correctly concluded:

> Under *Fanetti* . . . when an owner-employer does not use an independent stevedoring contractor to load, unload, or restow cargo, the owner-employer is liable to the worker for injuries caused by the owner-employer's negligence. There is no need to determine whether the acts of negligence are attributable to the owner-employer in its capacity as owner or as employer.

(App. B at 125a).

The appellate panel said that this conclusion "conflicts with our own previous case law. . . ." (App. A at 48a). *It does not.* It is precisely in line with *Fanetti*.

The appellate panel "recognize[d] that the district court was not alone in reading *Fanetti* to establish that a dual-capacity defendant will be liable in negligence under section 905(b) regardless whether its negligent conduct was in its capacity as the employer of harbor workers covered under the LHWCA or in its capacity as vessel." (App. A at 50a, n.20, citing several authorities, including *Morehead*). Nevertheless, the appellate panel singularly disagreed with *Fanetti* and, based upon its new

and unsupported interpretation of that case, reversed the district court and held that Mr. Gravatt's injuries were caused by S&B in its "role as the employer of Gravatt and his crew, not in S&B's role as vessel owner." (App. A at 46a).

The appellate panel agreed that *Fanetti* held that "a shipowner choosing to act as its own stevedore is [not] entitled to that insulation from liability, partial or total, which hiring an independent contractor might have afforded." *Fanetti*, 678 F.2d at 428 (App. A at 50a). Yet, the appellate panel disregarded this established law of the Second Circuit and reversed the district court (which correctly followed *Fanetti* on this issue), thereby effectively overruling *Fanetti*. In doing so, the appellate panel not only muddied the legal waters between the circuits, but also abused its authority because "only an *en banc* court or an intervening Supreme Court decision can overrule" a Second Circuit decision. *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 353 (2d Cir. 1993); *Kremer v. Chemical Construction Corp.*, 623 F.2d 786, 788 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

III. THE APPELLATE PANEL EXCEEDED ITS AUTHORITY WHEN IT IGNORED THE "CLEARLY ERRONEOUS" STANDARD OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND REVERSED THE DISTRICT COURT'S FINDING OF FACT THAT THE PLAINTIFF HARBOR WORKER'S "INJURIES WERE CAUSED BY S&B [THE DUAL CAPACITY EMPLOYER] IN ITS CAPACITY AS VESSEL OWNER."

As indicated above, the district court held that under *Fanetti*, S&B was liable to Mr. Gravatt for its gross negligence (App. B at 125a). It also held, that *even under Morehead,* S&B was liable to Mr. Gravatt because S&B's negligence was committed in its capacity as vessel owner (App. B at 118a). The appellate panel, however, disregarded this finding of fact by the district court, and improperly substituted its own view of the facts when it baldly stated, "[W]e find that S&B was not negligent in its vessel capacity." (App. A at 4a).

Whether an LHWCA dual capacity employer commits negligence in its capacity as employer or as vessel owner is a question of fact for the trier of fact. *Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528, 535-36 (5th Cir. 1991), *citing*, *Lormand v. Superior Oil Co.*, 845 F.2d 536, 543 (5th Cir. 1987); *Castorina v. Lykes Bros. S.S. Co., Inc.*, 758 F.2d 1025, 1033-334 (5th Cir. 1985); *Hollingsworth v. Anderson-Tully Co.*, 940 F. Supp. 967 (N.D. Miss. 1996).

The district court recognized that stowage of cargo is a "vessel operation" and found as a matter of fact:

> S&B *as vessel owner* had active control over the vessel and its cargo of debris and new material, and knew or should have known about the hazards created when commingling debris and new material and the potential for injury-causing accidents to occur . . . S&B did not exercise ordinary care in keeping its debris/material barge, crane barge, and vessel equipment in a condition that would permit its workers, who were not expert and experienced stevedores, to carry on cargo operations safely. *See, e.g., Moore v. M. P. Howlett*, 704 F.2d 39 (2d Cir. 1983). S&B failed to fulfill its *Scindia* duty to intervene and correct the hazardous condition created by commingling the debris and good materials on its barges and the use of timber tongs. *Morehead* also holds that the *Scindia* duty arising from active control over a hazardous condition is triggered when the dangerous condition is on the vessel itself. *See Morehead*, 97 F.3d at 613. S&B *as vessel owner*, had active control over the debris obstructing the new material that was loaded on the barge and breached *Scindia's* "active control" duty in causing and permitting the debris and good material to be commingled, as well as for allowing timber tongs to be used to move debris.

(App. B at 118a-119a, emphasis added); see also *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 848 (5th Cir. 1989).

The appellate panel agreed with the district court's factual finding that "S&B had 'active control' over the barge,

and 'actual knowledge' of [its own] negligent conduct." (App. A at 42a). Yet, it found that "S&B was not negligent in its vessel capacity." (App. A at 4a). Clearly, an error.[3]

The district court's finding of fact that S&B's negligence was committed in its vessel-owning capacity cannot be disturbed unless "clearly erroneous." *Mobil Shipping and Transport. Co. v. Wonsild Liquid Carriers, Ltd.*, 190 F.3d 64, 67-68 (2d Cir. 1999). A federal appellate court may set aside a trial court's findings of fact only if "clearly erroneous." *Amadeo v. Zant*, 486 U.S. 214 (1988). Where there are two permissible views of the evidence (*e.g.*, whether S&B wore its employer's hat or its vessel owner's hat when it acted negligently), the fact-finder's choice between them cannot, *as a matter of law*, be clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949).

In reviewing the trial court's findings, an appellate court "*may not substitute [its] own judgment on facts for that of the trial judge, who was in a superior position to appraise the evidence.*" *Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 550 (2d Cir. 1977) (emphasis added); *McAllister v. United States*, 348 U.S. 19, 20-21 (1954); *Counihan v.*

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3. *Cf. Morehead*, 97 F.3d at 605, where the court in "giving due deference to the district court's authority as fact finder," accepted the district court's finding that an open hatch was a condition created by the dual capacity employer in its role as employer. Similarly, the appellate panel in the instant case should have given due deference to the district court's finding that the hazardous condition on the barge which caused Mr. Gravatt's injuries was created by S&B in its role as vessel owner.

Allstate Ins. Co., 194 F.3d 357, 363 (2d Cir. 1999), *citing*, *Anderson*, 470 U.S. at 573; *S.S. Amazonia v. New Jersey Export Marine Carpenters, Inc.*, 564 F.2d 5, 8 (2d Cir. 1977).[4]

The appellate panel exceeded its authority of review under Fed. R. Civ. P. Rule 52(a). In doing so, the panel not only erred under law, but also, and most importantly, set a dangerous precedent contrary to public policy and the general welfare of harbor workers by permitting a dual capacity employer, who was "reckless and wanton" and "demonstrated a reckless disregard for the safety of the construction workers at the . . . job site" (App. B at 129a), to escape liability. As Judge Cyr said in *Morehead*, 97 F.3d at 620 (emphasis added):

> Indeed, permitting the dual capacity employer to compartmentalize its actual "knowledge" between its two artificial personae in these circumstances would undercut the primary LHWCA policy goal identified in *Scindia*. That is to say, there would be no economic incentive for shipowner-employers to hire independent stevedoring companies, which generally possess greater expertise in conducting longshoring activities with maximum levels of worker safety. Such an artificial rule inevitably would *increase the*

4. The appellate panel was also required, but failed, to construe the evidence in a light most favorable to the Gravatts, the plaintiffs-appellees. *United Barge Co. v. Notre Dame Fleeting & Towing Service, Inc.*, 568 F.2d 599, 602 (8th Cir. 1978); *State Farm Mutual Auto. Insurance Co. v. White*, 563 F.2d 971, 977 (9th Cir. 1977); *Barnes v. St. Catherine's Hospital*, 563 F.2d 324, 329 (7th Cir. 1977); *Case v. Morrisette*, 475 F.2d 1300, 1307 (D.C. Cir. 1973); and *Watson v. Joshua Hendy Corp.*, 245 F.2d 463, 464 (2d Cir. 1957).

hazardous working conditions encountered by longshore and harbor workers, and thereby undermine the spirit of the LHWCA.

It behooves this Court to protect the men and women who work on this great nation's docks, piers and bridges against the reckless and wanton conduct of unconscionable dual capacity employers who, in order to save a few dollars by cost cutting, jeopardize the lives and limbs of these workers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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